

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ANTHONY PIACQUADIO	:	DETERMINATION
for Revision of Determinations or for Refunds	:	DTA NOS. 829297
of Sales and Use Taxes under Articles 28 and 29 of the	:	AND 829589
Tax Law for the Period December 1, 2013 through	:	
November 30, 2016.	:	

Petitioner, Anthony Piacquadio, filed petitions for revision of determinations or for refunds of sales and use taxes under articles 28 and 29 of the Tax Law for the period December 1, 2013 through November 30, 2016.

Petitioner, appearing by Polsinelli, P.C. (Scott Ahroni, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (Bruce D. Lennard, Esq. and Melanie Spaulding, Esq., of counsel), executed a mutual consent, on July 21, 2022, to have this matter determined on submission without a hearing pursuant to 20 NYCRR 3000.12. All documents and briefs were to be submitted by February 24, 2023, which date began the six-month period for the issuance of this determination.

Based upon all pleadings and documents submitted in connection with this matter, Nicholas A. Behuniak, Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner, Anthony Piacquadio, was personally liable for the sales and use taxes due on behalf of Eden Ballroom, LLC, as a person required to collect and pay such taxes under the Tax Law.

FINDINGS OF FACT

The parties executed a joint stipulation of facts and documents, and the facts stipulated to therein are incorporated below where appropriate. The Division has submitted additional proposed findings of fact in a narrative format without numbering any of the proposed findings of fact. Since the Division has not separately numbered each of the proposed findings of fact, they have not been ruled upon. However, with certain modifications, they have been generally accepted. Petitioner submitted additional proposed findings of fact. Petitioner's additional proposed findings of fact have been largely accepted and incorporated herein to the extent deemed appropriate; however, part of petitioner's proposed finding of fact 7 is rejected as conclusory.

1. The Division of Taxation (Division) conducted a sales tax audit of Eden Ballroom, LLC (Eden Ballroom) for the period of December 1, 2013 through November 30, 2016 (audit period) and determined that Eden Ballroom owed the State additional sales and use taxes.

2. As part of the audit of Eden Ballroom, the Division determined that petitioner, Anthony Piacquadio, was a responsible person of Eden Ballroom.

3. The Division issued notice of determination L-047838953, dated March 26, 2018, to petitioner, in the amount of \$843,285.00 in tax, plus interest and penalty, as a responsible person for the sales taxes due from Eden Ballroom for the period of September 1, 2014 through November 30, 2016.

4. The Division issued notice of determination L-048708314, dated August 21, 2018, to petitioner, in the amount of \$394,618.39¹ in tax, plus interest and penalty, as a responsible person

¹ In its brief the Division recomputed and reduced the liability of notice of determination L-048708314 to \$237,344.00, plus interest.

for the sales taxes due from Eden Ballroom for the period of December 1, 2013 through November 30, 2016.

5. The Division issued notice of determination L-048760959,² dated September 17, 2018, to petitioner, in the amount of \$137,150.33 in tax, plus interest and penalty, as a responsible person for the sales taxes due from Eden Ballroom for the period of December 1, 2014 through November 30, 2016.

6. Petitioner filed a request for conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS) in protest of notice of determination number L-047838953. A conciliation conference was held on October 16, 2018, and on January 18, 2019, BCMS issued a conciliation order (CMS No. 000302527) sustaining notice of determination number L-047838953.

7. Petitioner filed a request for conciliation conference with the Division's BCMS in protest of the notices of determination numbers L-048708314 and L-048760959. A conciliation conference was held on April 11, 2019, and on July 19, 2019, BCMS issued a conciliation order (CMS No. 000304604) sustaining notices of determination numbers L-048708314 and L-048760959.

8. Petitioner filed a petition dated March 28, 2019, with the Division of Tax Appeals in protest of the conciliation order (CMS No. 000302527). The Division of Tax Appeals designated the petition DTA No. 829297.

² In its brief the Division cancelled this notice (L-048760959).

9. On September 26, 2019, petitioner filed a petition with the Division of Tax Appeals in protest of the conciliation order (CMS No. 000304604). The Division of Tax Appeals designated the petition DTA No. 829589.³

10. On March 16, 2022, petitioner filed a motion to dismiss claims for personal per se liability. In support of petitioner's motion, petitioner submitted the affidavit of Lawrence Cole, CPA (petitioner's representative at the time) sworn to on March 16, 2022. In his affidavit, Mr. Cole indicated that he attached "true and accurate" copies of the 2013 through 2016 Eden Ballroom annual federal schedule K-1s. Each of the 2013 through 2016 Eden Ballroom schedule K-1s attached to Mr. Cole's affidavit indicates that ownership of Eden Ballroom was split evenly between MC Hospitality, LLC, and Ibiza United Space, LLC. In support of petitioner's motion, Mr. Cole submitted a memorandum of law, wherein he asserts that the federal schedule K-1s he provided establish that petitioner was not a member or partner of Eden Ballroom during the audit period and therefore petitioner was not per se liable for Eden Ballroom's sales and use taxes due to the State. The undersigned ruled that the motion would be addressed in the final determination of this matter.

11. As part of the parties' stipulation of facts and documents, petitioner concedes the dollar amount and calculations of the relevant notices at issue. Furthermore, petitioner does not challenge that Eden Ballroom owes the State the sales and use taxes at issue.

12. In support of its position, the Division submitted the affidavit of Julieta Bell, Section Head and Tax Auditor III, sworn to on August 24, 2022. Ms. Bell was involved with the audits

³ The Division filed a motion dated January 28, 2020, for an order dismissing the petition designated as DTA 829589 or, in the alternative, granting summary determination in its favor on the basis that petitioner's protest was not timely filed. On May 13, 2020, petitioner filed a motion seeking an order dismissing the Division's motion and/or alternatively granting petitioner damages for the Division's alleged frivolous affidavit and cancelling notices of determination numbers L-048708314 and L-048760959 and nullifying conciliation order No. 000304604. The Division withdrew its motion. The Division of Tax Appeals issued an order, dated October 8, 2020, denying petitioner's motion.

of Eden Ballroom and petitioner and subsequently reviewed the related audit file for these matters. In her affidavit, Ms. Bell averred that the Division determined that petitioner was a responsible party for Eden Ballroom based upon the following evidence which was included as a series of attachments to her affidavit:⁴

- (i) a consent to extension of time for the audit of Eden Ballroom, dated February 1, 2017, signed by petitioner as the managing member of Eden Ballroom;
- (ii) a sales tax examination questionnaire for Eden Ballroom, dated May 23, 2017, signed by petitioner and identifying him as a managing member;
- (iii) a responsible person questionnaire, form AU-431, covering the audit period, dated and signed by petitioner on January 24, 2017, identifying petitioner as a managing member of Eden Ballroom;
- (iv) a power of attorney, form POA-1, for Eden Ballroom, covering the audit period and signed by petitioner listing his title as president of the company, and dated January 24, 2017;
- (v) a quarterly sales tax return, form ST-100, for Eden Ballroom, covering the period of December 1, 2013 through February 28, 2014, with petitioner's name typed into the box titled "[s]ubmitted by;"
- (vi) a form ST-100, for Eden Ballroom, covering the period March 1, 2014 through May 31, 2014, with petitioner's name typed into the box titled "[s]ubmitted by;"
- (vii) a form ST-100, for Eden Ballroom, covering the period June 1, 2014 through August 31, 2014, with petitioner's name typed into the box titled "[s]ubmitted by;"

⁴ In his opening brief, petitioner concedes that he did sign the documents where his signature appears on the documents that were attached to Ms. Bell's affidavit.

(viii) an application to register for sales tax certificate of authority, form DTF-17, dated October 18, 2011, identifying petitioner as a responsible person and the president of Eden Ballroom; and,

(ix) a form DTF-17, dated October 21, 2013, identifying petitioner as a responsible person and a member of Eden Ballroom, with section G of the form indicating that petitioner owned 50% of the company.

13. The responsible person questionnaire submitted with the Bell affidavit (*see* finding of fact 12 [iii]) reflected that petitioner:

(i) was responsible for preparing or supervising the preparation of sales tax returns and ensuring the remittance of tax;

(ii) participated in making significant business decisions;

(iii) was responsible for maintaining and managing the business;

(iv) owned corporate and voting stock;

(v) had a substantial economic stake in the business;

(vi) had authority to manage Eden Ballroom, with knowledge and control over the financial affairs;

(vii) had authority to pay or direct payment of bills or other business liabilities;

(viii) had authority to sign checks for the Eden Ballroom;

(ix) had authority to act on behalf of the business with the Division;

(x) had authority to sign consents extending periods of limitations;

(xi) had authority to sign a power of attorney for the business;

(xii) had authority to sign consents fixing tax;

(xiii) had authority to sign installment payment agreements;

(xiv) had authority to hire and fire employees;

(xv) had authority to negotiate loans and borrow money for the business or guarantee business loans; and,

(xvi) was involved with the financial affairs of Eden Ballroom.

14. In support of his position, petitioner submitted:

(i) a letter from Jeffrey Shapiro, M.D., dated November 11, 2022, wherein Dr. Shapiro indicates that petitioner is a patient of the doctor, and he suffers from hypertension, obesity, type 2 diabetes, "GERD," and severe chronic back pain. Dr. Shapiro also wrote that petitioner had "s/p bariatric surgery in 2013 to alleviate his chronic back pain and morbid obesity." Dr. Shapiro indicates that petitioner was under the care of another physician whose medical records were all destroyed by a fire; however, Dr. Shapiro would have recommended the same care petitioner's previous doctor had recommended which was rest, limited physical activity, a stay-at-home work schedule, use of proper body mechanics, "NSAIDS," and chiropractic treatment and physical therapy;

(ii) a letter, dated December 5, 2022, from Dr. Saal of South Shore Spinal Care indicating that due to an injury that occurred in July of 2014, petitioner was treated by the doctor's office and was receiving chiropractic and physical therapy treatments two to three times a week for lumbar radiculopathy, and had been advised to avoid strenuous activities from work and travel;

(iii) the affidavit of Michael Geniton, the former managing member of Eden Ballroom, who represented that in the summer of 2014, petitioner hurt his back and had medical issues that prevented him from operating Eden Ballroom. Mr. Geniton asserts that, due to his injuries, petitioner delegated all of his business responsibilities to him and

petitioner was not present at the business from September 2014 through the beginning of 2016. Mr. Geniton also asserts that, during his absence, petitioner communicated with him periodically on the phone if any major issues needed to be addressed;

(iv) the affidavit of Joseph Luciano, who was security guard for Eden Ballroom from September 2014 through November 2015. Mr. Luciano asserts that he knew petitioner and that in the late summer of 2014 petitioner advised him that he had suffered a back injury. While he was working as a security guard at Eden Ballroom, he had almost no physical interactions with petitioner because petitioner was not present at the business due to his injuries;

(v) the affidavit of James Caban, who was the community liaison of Eden Ballroom from September 2014 to December 2018. Mr. Caban asserts that his responsibilities included interfacing with the New York City Police Department and other community organizations regarding conflicts the business may have with the community, such as noise and loitering complaints. Mr. Caban represented that during his employment with Eden Ballroom he reported directly to Michael Geniton who was the managing member of the business. Mr. Caban also asserts that, during his employment at Eden Ballroom, he only had a few interactions with petitioner since petitioner was not present at the business due to his various medical issues; and,

(vi) a copy of Julieta Bell's affidavit with all the related attachments.

SUMMARY OF THE PARTIES' POSITIONS

15. Petitioner asserts that he cannot be held liable as a responsible party under the tax law since he was not a member of Eden Ballroom and furthermore, he delegated his managerial duties for Eden Ballroom to Mr. Geniton during the audit period because of his injuries.

16. The Division asserts that since petitioner was a member of Eden Ballroom, petitioner is liable for Eden Ballroom's associated sales and use taxes due to the State. The Division also asserts that based upon the documentation in the record indicating that petitioner was involved with the management of Eden Ballroom, petitioner had sufficient authority to be held liable as a responsible person.

CONCLUSIONS OF LAW

A. Tax Law former § 1133 (a) provided, in part, that: "every person required to collect any tax imposed by this article [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under this article."

B. During the years at issue, Tax Law former § 1131 (1) provided in relevant part:

"Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership, any employee or manager of a limited liability company, or any employee of an individual proprietorship who as such officer, director, employee or manager is under a duty to act for such corporation, partnership, limited liability company or individual proprietorship in complying with any requirement of this article; and any member of a partnership or limited liability company."

During the years at issue, the Tax Law contained no factors to qualify or limit the liability imposed upon members of partnerships or limited liability companies and imposed per se liability upon such members (*see Matter of Santo*, Tax Appeals Tribunal, December 23, 2009 ["Petitioner was a member of a limited liability company and, as with members of a partnership, such members are subject to per se liability for the taxes due from the limited liability company Since Tax Law [former] § 1131 (1) imposes strict liability upon members of a partnership or limited liability company, all that is required to be shown by the Division for liability to obtain is the person's status as a member."]; *see also Matter of Bartolomei*, Tax Appeals Tribunal,

April 3, 1997). Clearly, Tax Law former § 1131 (1) provides that any member of a partnership or any member of a limited liability company is a “person required to collect any tax imposed by this article” and, as provided in Tax Law former § 1133 (a), a member of a limited liability company “shall be personally liable for the tax imposed, collected or required to be collected under this article.” Accordingly, if petitioner was a member of the Eden Ballroom during the audit period, he would be personally liable for the sales tax required to be collected and remitted to the State from that entity.

C. Petitioner bears the burden of proof to overcome the presumed correctness of the Division’s assessment (*see Matter of Mera v Tax Appeals Trib.*, 204 AD2d 818 [3d Dept 1994]; *see also Matter of Blodnick v New York State Tax Commn.*, 124 AD2d 437 [3d Dept 1986], *appeal dismissed* 69 NY2d 822 [1989]) and has not met his burden of proof in this case to show that he was not a person required to collect and remit tax for Eden Ballroom.⁵ Upon review of the record, it is concluded that the evidence shows that petitioner was a member of Eden Ballroom during the audit period and petitioner has not met his burden of proof to establish otherwise. There are several documents in the record that support this conclusion. The consent to extension of time is signed by petitioner as the managing member of Eden Ballroom; the sales tax examination questionnaire for Eden Ballroom is signed by petitioner and identifies him as a managing member; the responsible person questionnaire indicates that petitioner owned stock in

⁵ Tax Law § 1133 (a) was amended, effective April 12, 2018, to provide that if a limited partner of a limited partnership or member of a limited liability company applies to the Division for relief and demonstrates to the satisfaction of the Commissioner that such limited partner’s or member’s ownership interest and the percentage of the distributive share of the profits and losses of such limited partnership or limited liability company are each less than fifty percent, and such limited partner or member was not under a duty to act for such limited partnership or limited liability company in complying with any requirement of article 28, that the limited partner’s or member’s liability will be limited to reflect such limited partner’s or member’s ownership interest of distributive share of the profits and losses of such limited partnership or limited liability company, whichever is higher. The relief provided for in the amendment was not in effect during the period at issue, and as noted above, Tax Law former § 1131 (1), as in effect for the period at issue, imposed strict liability upon members of a partnership or limited liability company.

Eden Ballroom, had a substantial economic stake in the business and identifies petitioner as a managing member of Eden Ballroom; and the application to register for sales tax certificate of authority, dated October 21, 2013, identifies petitioner as a responsible person and a member of Eden Ballroom, with section G of the form indicating that petitioner owned 50% of the company.

The petitioner concedes that he signed the forms where his signature appears. Petitioner now attempts to distance himself from member liability by claiming that, during the audit period, he had delegated his management responsibilities to others.

Petitioner also asserts that the schedule K-1s establish that petitioner was not a member of Eden Ballroom during the audit period, but rather two other entities were the sole owners. Initially, it is noted that the schedule K-1s alone do not sufficiently challenge the other compelling documentation in the record which indicate petitioner was a member of Eden Ballroom. Furthermore, the authentication and support for the schedule K-1s included with petitioner's motion is solely that of petitioner's then representative, Mr. Cole, who does not offer or profess to have any knowledge of the provenance or origin of the schedule K-1s other than to summarily represent that they are "true and accurate" copies; without providing additional support, the documents are given limited weight (*see Matter of Wisdom*, Tax Appeals Tribunal, April 9, 1998). Given the competing evidence in the record, petitioner's argument that he was not a member does not rebut the evidence that indicates otherwise.

Accordingly, petitioner is personally liable for the taxes imposed upon Eden Ballroom by virtue of his status as a member of Eden Ballroom.

D. In addition, individual liability for an LLC is not limited to just members of the business. Aside from the strict liability imposed on a member of an LLC, whether an individual is personally liable for tax under Tax Law former § 1131 (1) is determined upon the particular

facts of each case (*see Matter of Cohen v State Tax Commn.*, 128 AD2d 1022 [3d Dept 1987]; *Matter of Hall*, Tax Appeals Tribunal, March 22, 1990, *confirmed* 176 AD2d 1006 [3d Dept 1991]; *Matter of Martin*, Tax Appeals Tribunal, July 20, 1989, *confirmed* 162 AD2d 890 [3d Dept 1990]; *Matter of Autex Corp.*, Tax Appeals Tribunal, November 23, 1988). The pivotal question to be resolved is whether petitioner had, or could have had, sufficient authority and control over the affairs of the corporation to be considered a person under a duty to collect and remit the unpaid taxes in question (*see Matter of Capeci*, Tax Appeals Tribunal, February 23, 2023). Relevant factors include the individual's authority to sign corporate checks; the individual's economic interest in the corporation; and the individual's knowledge of and control over the financial affairs of the corporation (*id.*). The relevant consideration is "petitioner's authority and responsibility to exercise control over the corporation, not his actual assertion of such authority (citations omitted)" (*see Matter of Coppola v Tax Appeals Trib.*, 37 AD3d 901 [3rd Dept 2007]).

In this case, a power of attorney form for Eden Ballroom was executed by petitioner as the president of the company, several quarterly sales tax returns for Eden Ballroom were filed where the returns indicated that petitioner had filed them. Also, an application to register for sales tax certificate of authority was filed for Eden Ballroom identifying petitioner as a responsible person and the president of the company. In addition, the responsible person questionnaire submitted for Eden Ballroom indicates that petitioner, among other powers: was responsible for preparing or supervising the preparation of sales tax returns and ensuring the remittance of tax; participated in making significant business decisions; was responsible for maintaining and managing the business; owned corporate and voting stock; had a substantial economic stake in the business; had authority to manage the business with knowledge and

control over financial affairs; could pay or direct payment of bills or other business liabilities; had check signing authority; had the power to hire and fire employees; had the power to negotiate loans and borrow money for the business or guarantee business loans; and, was involved with the financial affairs of the corporation.

Petitioner asserts that he did not actually exercise these powers because he was injured and delegated his authority to another while he recovered. However, as noted above, the question is not whether a person exercised the requisite powers but, rather, if the person possessed such powers. In the case at hand, it appears petitioner did in fact possess significant management powers over the company but delegated them to another because of an injury. Notably, the individual that petitioner delegated his authority to during his injury, Mr. Geniton, asserts in his affidavit that during petitioner's absence, petitioner communicated with him periodically if any major issues needed to be addressed. The fact that petitioner delegated his managerial powers instead of actually exercising them himself does not exonerate petitioner from the responsible party liability that flows with such powers (*see Matter of Coppola*).

Accordingly, petitioner is also personally liable for the taxes imposed upon Eden Ballroom by virtue of the management powers he possessed during the audit period.

E. The petitions of Anthony Piacquadio are denied, and notices of determination number L-047838953, dated March 26, 2018, and number L-048708314, dated August 21, 2018, subject to the modifications conceded by the Division, are sustained.

F. The motion of Anthony Piacquadio, dated March 16, 2022, is denied.

DATED: Albany, New York
August 24, 2023

/s/ Nicholas A. Behuniak
ADMINISTRATIVE LAW JUDGE